The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

LCR 37 JOINT SUBMISSION REGARDING THE GOVERNMENT'S RESPONSES TO INTERROGATORIES WITHHELD UNDER DELIBERATIVE PROCESS PRIVILEGE

NOTE ON MOTION CALENDAR:
February 28, 2020

PLAINTIFFS' STATEMENT

Plaintiffs are the moving party for this submission. Pursuant to Federal Rules of Civil Procedure 26, 33, and 37, and Local Rule 37, Plaintiffs request an order compelling Mark Esper, in his official capacity as Secretary of Defense, and the United States Department of Defense ("DoD") (together, "the Government") to fully answer Plaintiffs' Interrogatory Nos. 16–18. The parties have met and conferred over the past four months in good faith to try and resolve this dispute without Court action, but with little to no progress made towards resolution, this dispute is now ripe for resolution by the Court. Plaintiffs respectfully request that the Court grant Plaintiffs' motion in full.

PLAINTIFFS' OPENING ARGUMENT

A. Factual and procedural history relating to Plaintiffs' response to interrogatories.

Plaintiffs seek to compel more fulsome responses to Interrogatory Nos. 16–18 following the parties' extensive meet-and-confer efforts and this Court's deliberative process privilege rulings.

In response to Interrogatory No. 16, which requests that the Government identify those who "reviewed, revised, or commented on any drafts" of Secretary Mattis' February 22, 2018 Memorandum, the Government identifies the author of that Memorandum as only Mr. Mattis himself, and refuses to provide the names of other persons who "reviewed, revised, or commented" on the Memorandum or draft Memorandum. Similarly, in response to Interrogatory No. 17, which requests that the Government identify those persons who "reviewed, revised, or commented on any drafts" of the "February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons" ("Report"), the Government indicates only that the Report was [redacted] The Government refuses to otherwise explain who reviewed, revised, or commented on the Report or draft Report.

The Government's response to Interrogatory No. 18 is likewise incomplete. That interrogatory asks that the Government to identify the attendees of any meeting of the so-called

"Panel of Experts," including individuals that supported the Panel, and to detail the input each person identified provided. Although the Government's responses do identify at least some individuals who attended Panel meetings, they are deficient in two respects. First, the Government does not make clear whether it has identified the names of *all* persons who attended Panel meetings. (*See* February 28, 2020 Declaration of Vanessa Barsanti ("Barsanti Decl.") ¶ 2, Ex. 1.) It indicates that it is providing only [redacted]—without making clear whether it is actually withholding any names on the basis of privilege. The Government also construes the interrogatory to ask only for those who attended [redacted] meetings of the Panel, without identifying whether there were other [redacted] sessions or communications through which input was provided. Second, the Government does not for any person actually "describe" (much less "describe in detail") what input the person provided. This information should be produced.

B. The Government Has Failed to Adequately Respond to Plaintiffs' Interrogatory Nos. 16-18.

1. Interrogatories at Issue

Plaintiffs' Interrogatory Nos. 16–18 and the Government's deficient responses are as follows:

> **Interrogatory No. 16:** Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of Secretary James Mattis's February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals.

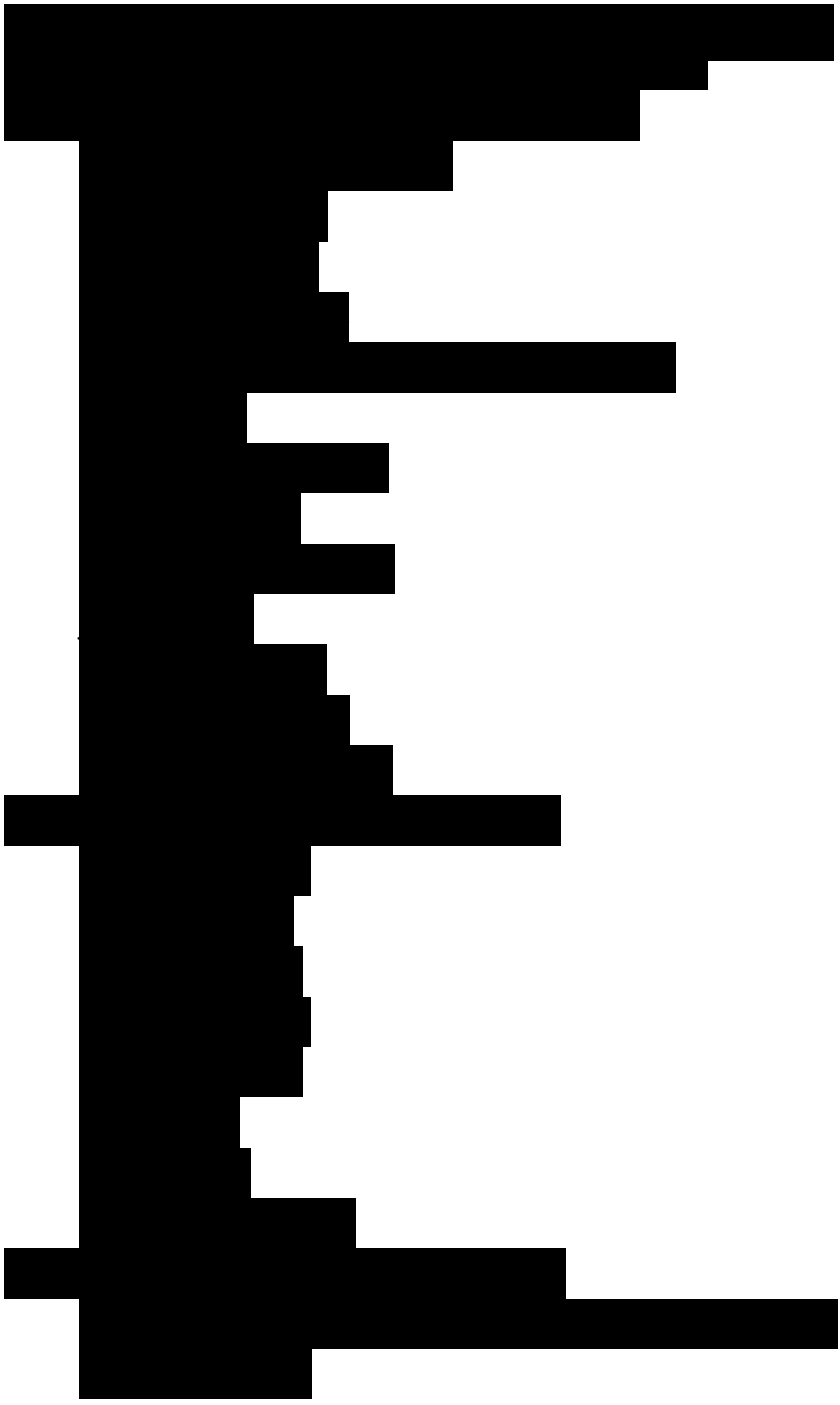
[redacted]

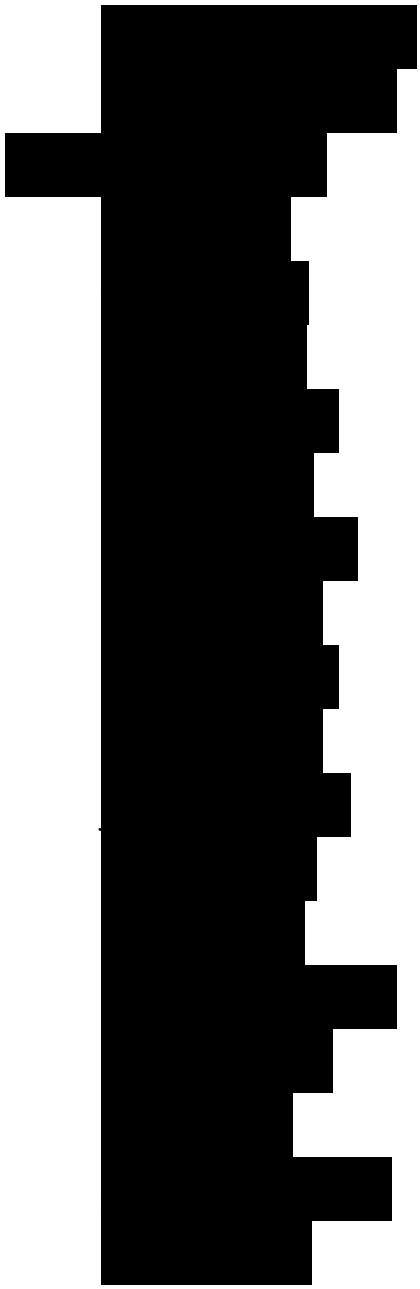
[redacted]

After Plaintiffs provided their opening argument in this L.R. 37 submission, the Government supplemented its response to Interrogatory No. 16.

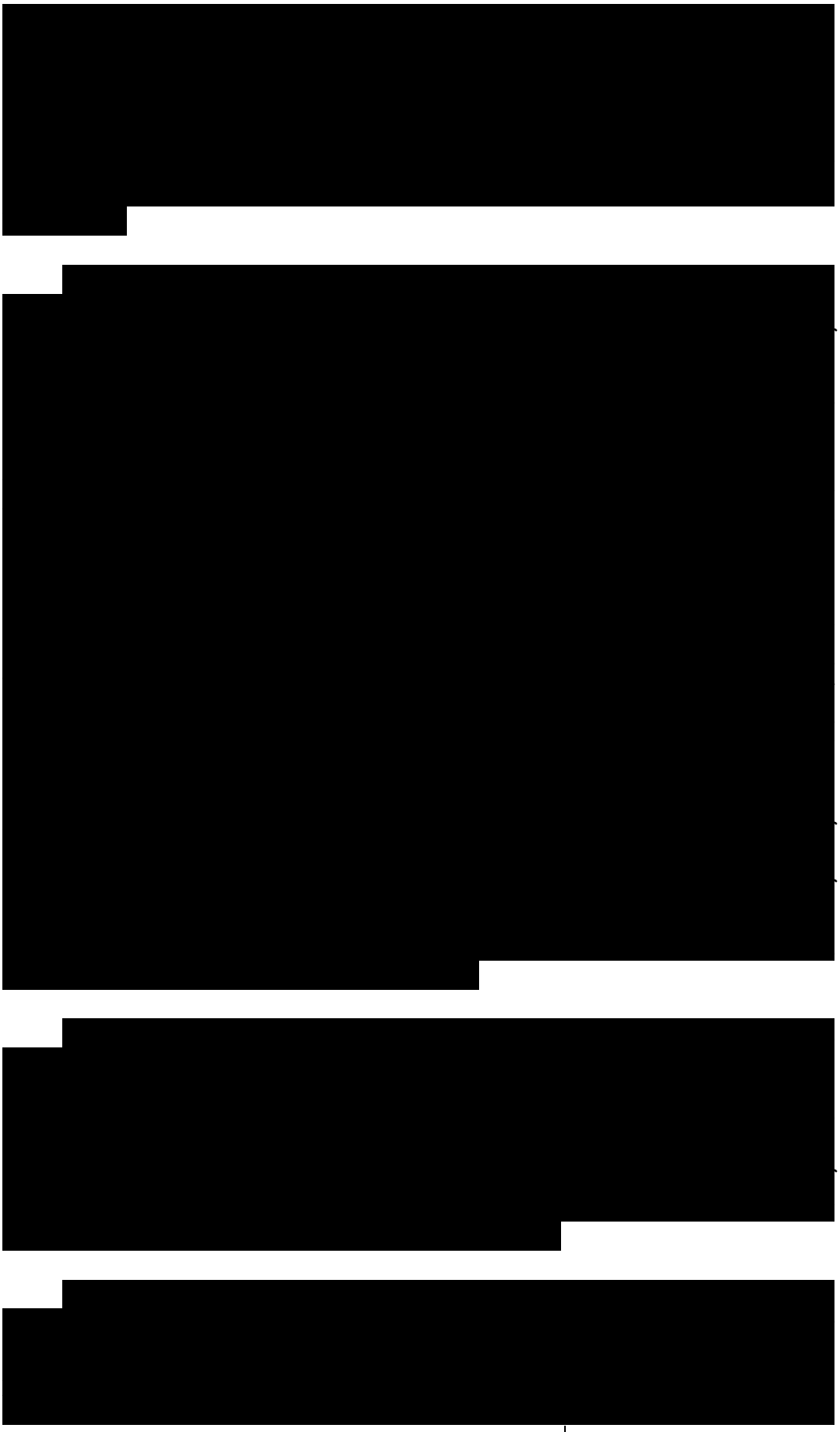
[redacted]

[redacted]





Interrogatory No. 17: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons.



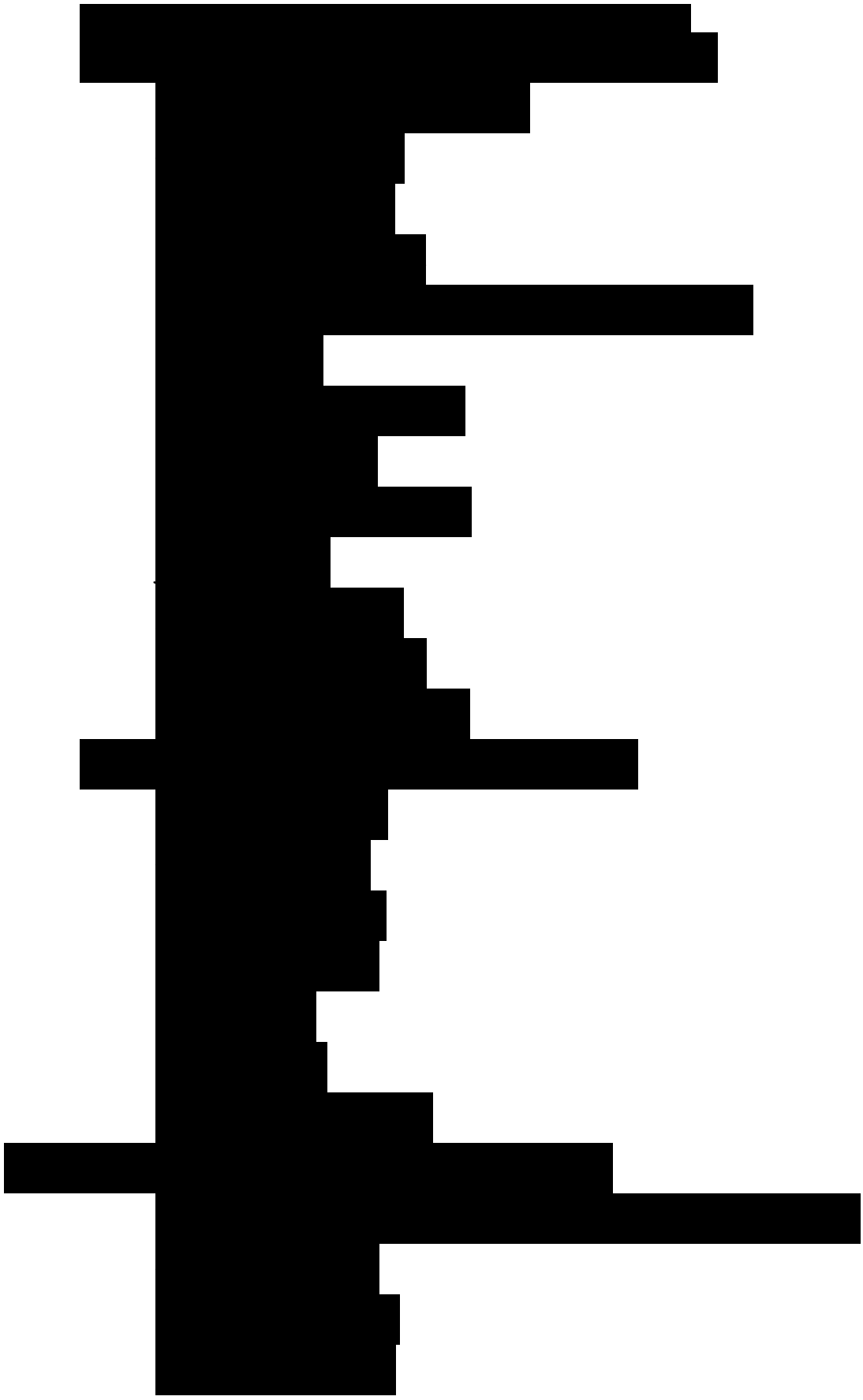
[redacted]

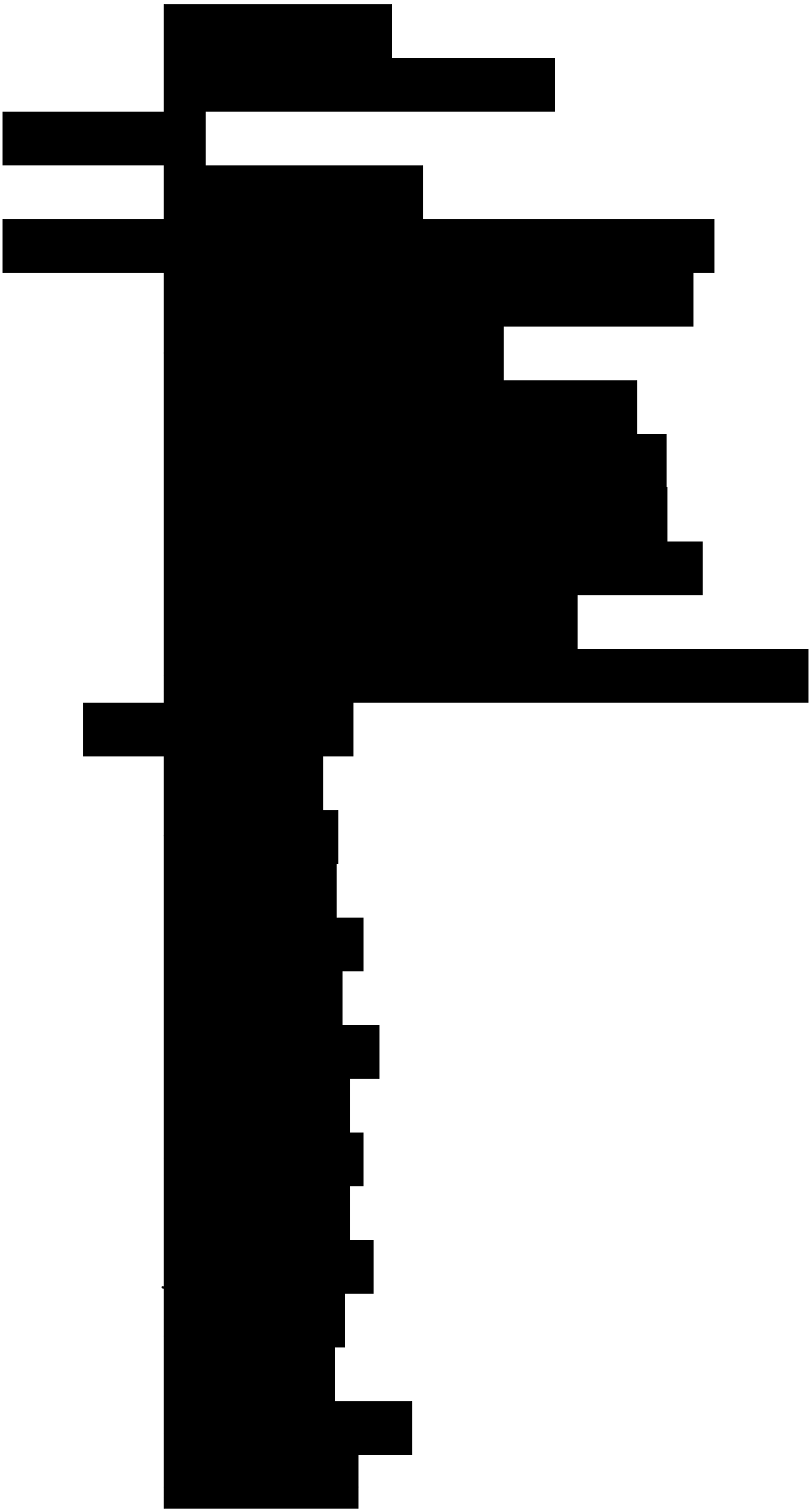
After Plaintiffs provided their opening argument in this L.R. 37 submission, the Government supplemented its response to Interrogatory No. 17.

[redacted]

[redacted]

[redacted]





[redacted]

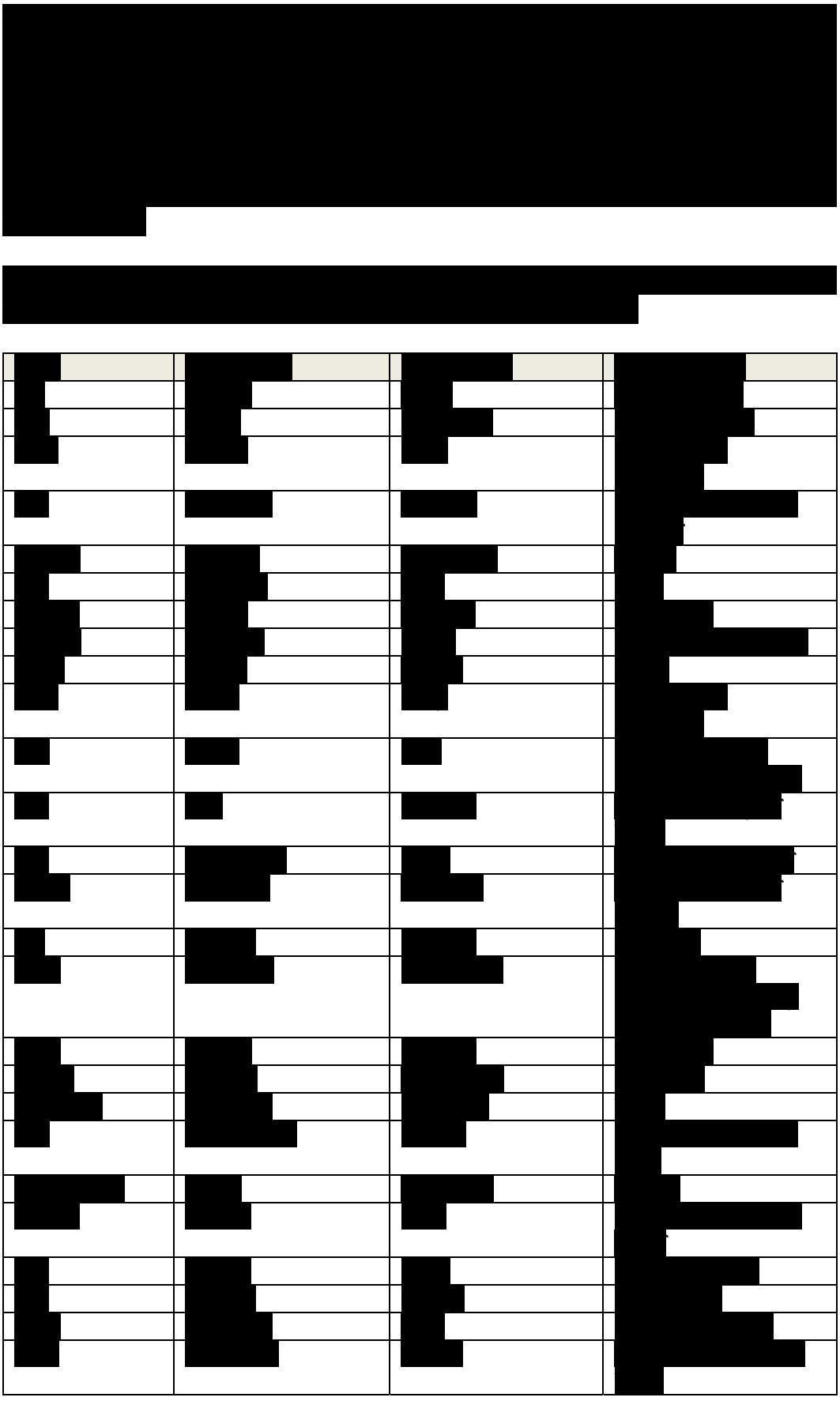
Interrogatory No. 18 asks that the Government provide information about the meeting attendees of the so-called "Panel of Experts," and what input those attendees provided. Specifically, Plaintiffs' Interrogatory and the Government's response state:

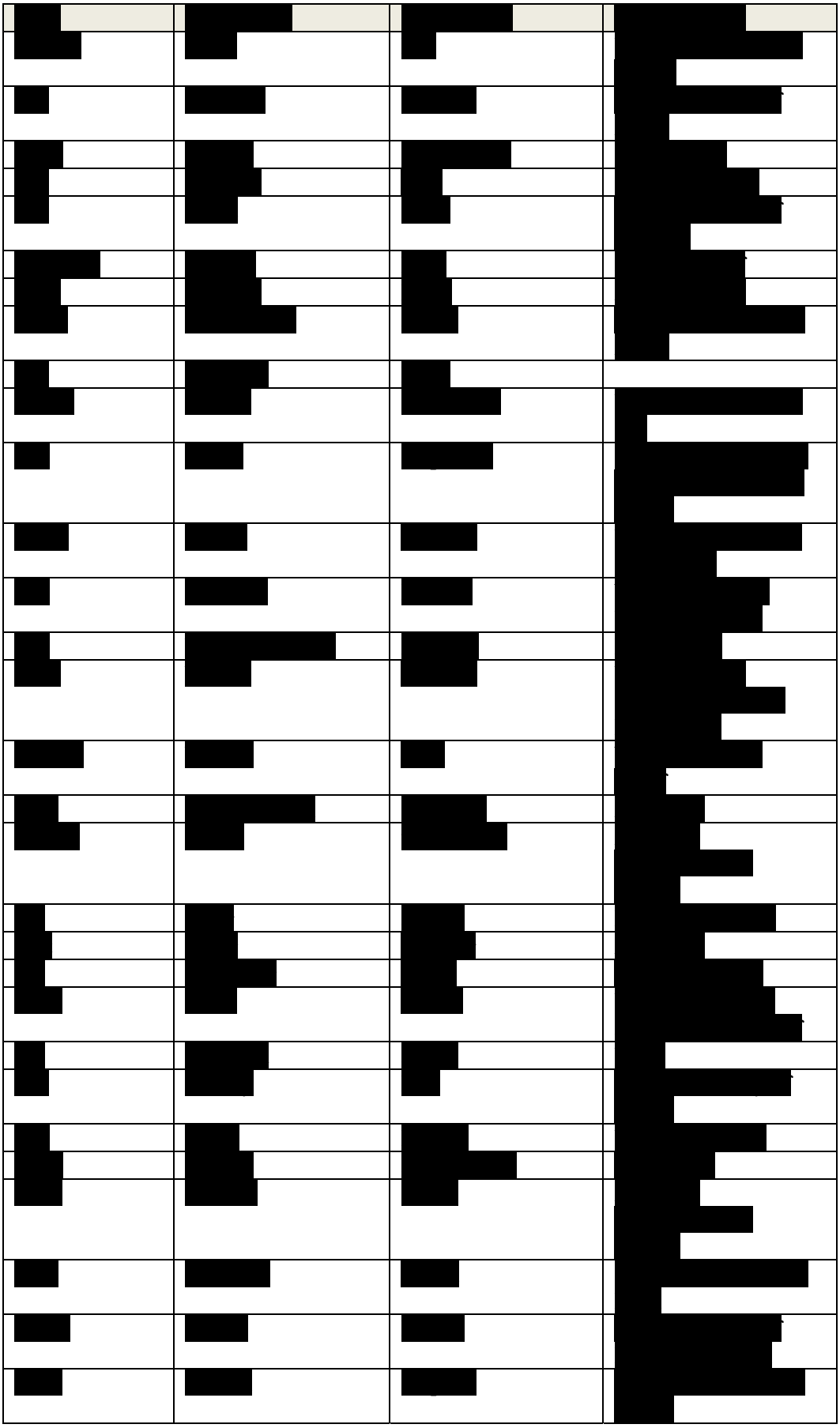
> **Interrogatory No. 18:** Identify each person who attended any meeting of the Panel of Experts and/or provided the Panel of Experts or its members any information, statement, advice, opinion, or other input of any nature or kind, including without limitation the Transgender Service Policy Working Group, any other group or committee within the Department of Defense that reviewed or considered transgender issues, members of agencies other than the Department of Defense, military medical professionals, civilian medical professionals, transgender service members, the commanders of transgender service members, elected officials, third parties, lobbyists, experts, and/or consultants, and describe in detail the information, statement, advice, opinion, or other input such person provided.

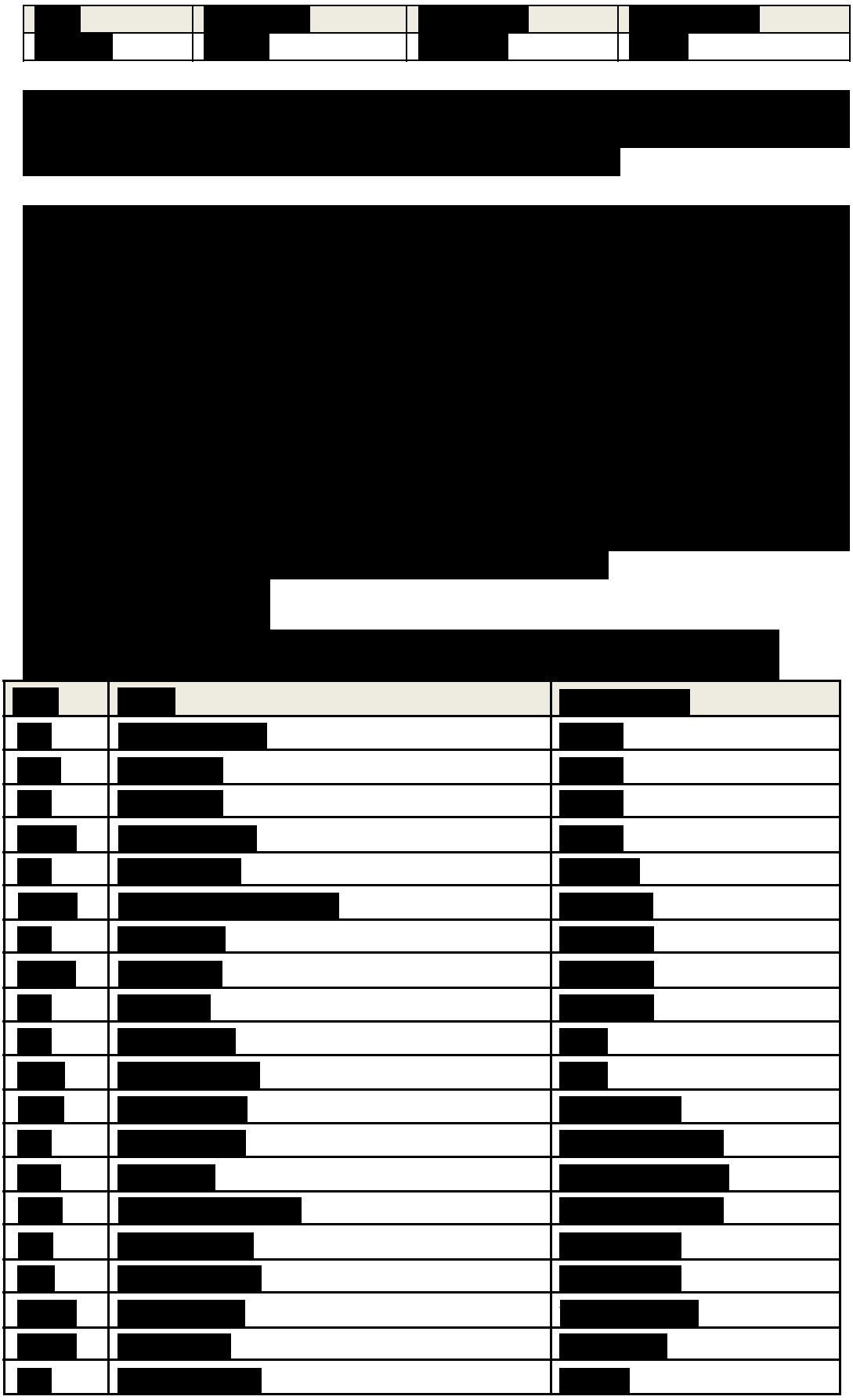
[redacted]

[redacted]

[redacted]







[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

2. Argument

Where a party has served discovery, "[a]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond." *Moneyham v. United States*, No. EDCV 17-329-JVS (KK), 2019 WL 4137612, at *2 (C.D. Cal. June 12, 2019) (quoting FED. R. CIV. P. 37(a)(4)); *see also Staples v. Dep't of Health & Hum. Servs.*, No. C07-5443RJB, 2008 WL 4425998, at *4 (W.D. Wash. Sept. 25, 2008) (requiring fulsome responses where interrogatory answers were "evasive or incomplete"). In this case, the Government does not have a basis for declining to fully answer Plaintiffs' interrogatories.

The Court's recent orders make clear that information of the type sought here is not properly protected under the guise of the deliberative process privilege. The Court has already held that "the deliberative process privilege does not apply to documents that were used or considered in the development of the Mattis Plan," adopting the reasoning that "the deliberative process privilege should not be used to shield discovery into Defendants' decision-making process and intent when the extent and scope of that decision-making process is a central issue in this lawsuit." Dkt. No. 394 at 4–6. That reasoning applies equally to the interrogatories at issue here. Interrogatory Nos. 16–17 seek the names of those who contributed to official documents at the heart of justifying the Government's "new" policy. The same is true of Interrogatory No. 18, which seeks information at the core of who provided and what information went into the Government's process, and whether that process was truly based on military judgment, or instead was shaped by "elected officials, third parties, [and] lobbyists." *See* Pls.' Interrogatory No. 18, *supra*.

The Government's invocation of Rule 33(d) in response to Interrogatory No. 18 is misplaced; that rule is operable only where "the burden of deriving or ascertaining the answer will be substantially the same for either party," and where the respondent "specif[ies] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify

them as readily as the responding party could." FED. R. CIV. P. 33(d). *See, e.g.*, *LVB-Ogden Mktg., LLC v. Bingham*, No. 2:18-cv-00243-TSZ, 2019 WL 142031, at *5 (W.D. Wash. Jan. 9, 2019) ("Even if Rule 33(d) were somehow applicable, Defendants fail to specify where in the Trustee's previous document production, their answers can be found."). The Government's contention that they may avoid providing a complete response to Interrogatory No. 18 merely by pointing to the Administrative Record misses the mark because those documents do not reveal all persons who provided input to the Panel, or what input they provided.

Moreover, Defendants' other privilege objections to these interrogatories lack merit. Defendants do not explain how these interrogatories could implicate the attorney-client or work product privileges, because they cannot. *C.f. Newport Pac. Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 632, 633, 636 (S.D. Cal. 2001) (party resisting discovery has the burden of establishing any assertion of attorney-client privilege, attorney work product, or deliberative process privilege). And Defendants' Privacy Act (5 U.S.C. § 552a) objections are even wider of the mark: that Act is aimed only at information not asked for by Plaintiffs here, such as persons' "education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph," 5 U.S.C. § 552a(a)(4), and applies only to information stored in a "system of records," 5 U.S.C. § 552a(a)(5); *Smith v. Potter*, 17 F. App'x 731, 731 (9th Cir. 2001) ("[A] threshold requirement of a Privacy Act claim is that the agency maintain a system of records that contain[] the record at issue."); *Fisher v. Nat'l Insts. of Health*, 934 F. Supp. 464, 473 (D.D.C. 1996) (holding that database files were not a "system of records" where they were not regularly "accessed by the agency by use of a personal identifier"). Nor is identifying potential witnesses by name an unusual or burdensome request, especially in light of the Court's protective order. *See, e.g.*, *In re Harmonic, Inc. Sec. Litig.*, 245 F.R.D. 424, 425 (N.D. Cal. 2007) (ordering discovery of witness names, even where names were confidential).

Finally, as Defendants have done in every discovery dispute in this case, they object that complying with their discovery obligations would be burdensome or oppressive, and yet provide

no explanation or justification. *C.f. Partner Weekly, LLC v. Viable Mktg. Corp.*, No. 2:09-cv-2120-PMP-VCF, 2014 WL 1577486, at *2 (D. Nev. Apr. 17, 2014) (requiring that party resisting discovery allege "specific facts" or "sufficient detail" about the nature and extent of any purported burden). Here, Defendants do nothing to support that objection. There is nothing burdensome about what Plaintiffs request, and importantly, what little burden there is on Defendants is vastly outweighed by the benefit to Plaintiffs. *See FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2015 WL 11256312, at *2 (W.D. Wash. Aug. 3, 2015) (granting motion to compel interrogatory responses where burdens "d[id] not outweigh its significant benefit").

Because the Government has failed to respond in full to Interrogatory Nos. 16–18, and because each of its objections is without merit, Plaintiffs respectfully request the Court grant Plaintiffs' motion to compel and order the Government to provide the requested information. In particular, the Government should be ordered to fully respond to Interrogatory Nos. 16 and 17 by specifying which individuals reviewed, revised, or commented upon draft or final versions of the Mattis Memorandum or Report. The Government should also be ordered to fully respond to Interrogatory No. 18 by providing *all* names of the attendees of the Panel of Experts meetings, and by describing in detail what input or information each attendee and each person supporting the Panel provided.

DEFENDANTS' OPENING ARGUMENT[1]

A. Interrogatory Nos. 16 and 17

As Defendants indicated in their most recent joint status report, ECF No. 408, Defendants are supplementing their interrogatory responses to provide a list of individuals who reviewed, revised, or commented on any drafts of former Secretary Mattis's February 22, 2018 Memorandum for the President (Interrogatory No. 16) and the February 2018 Department of Defense Report and Recommendations (Interrogatory No. 17).

[1] The expedited procedures of Local Rule 37(a)(2) for resolving discovery disputes are only available upon "agreement" of the parties. Defendants have not given their consent to the expedited procedures and reiterate their objection to Plaintiffs' use of Local Rule 37(a)(2) without their consent.

B. Interrogatory No. 18

Plaintiffs characterize Interrogatory No. 18 as seeking "information at the core of who provided and what information went into the Government's process, and whether that process was truly based on military judgment, or instead was shaped by 'elected officials, third parties, [and] lobbyists.'" *See* Plaintiffs Submission, *supra*, at § B.2. To that end, it asks "the Government to identify the attendees of any meeting of the so-called 'Panel of Experts,' including individuals that supported the Panel, and to detail the input each person identified provided." *Id.* at § A. In response, Defendants have already provided a listing of the identity of persons who attended formal meetings of the Panel of Experts, as well as the identity of official working groups that supported the Panel of Experts. They have also provided a Civil Rule 33(d) response that includes page ranges for the relevant proceedings of the Panel of Experts responsive to Plaintiffs' inquiries about the contributions of the Panel and its support staff. The current contents and structure of the response are tailored to Plaintiffs' need for information about the deliberations of the Panel of Experts. Plaintiffs' concerns about this response do not merit further supplementation.

First, Plaintiffs assert that the response is ambiguous as to whether "all persons who attended Panel meetings" have been identified, questioning if the names of attendees have been withheld on the basis of privilege and if there were ever any "informal" Panel of Experts sessions or other types of communications through which input was provided. At this juncture, the only names of Panel attendees that have not been provided are the names of transgendered service members who participated in a Panel of Experts meeting, ADMINISTRATIVE_RECORD_002826–28, and the names of commanders from the various services who shared their experiences with transgendered service members in their formation with the Panel, ADMINISTRATIVE_RECORD_002822–23. Withholding the personally identifiable information of active duty military members who agreed to share their experience with the Panel does not implicate Plaintiffs' concern that Defendants are withholding the names

of "elected officials, third parties, and lobbyists."[2] Plaintiffs should be aware of the sensitivity involved in disclosing the names of currently serving transgendered service members, as one of the Plaintiffs is proceeding under a pseudonym in this case. (*See* First Am. Compl. ¶ 14 (describing "Jane Doe").) As to Plaintiffs' other contentions, there are no "informal" proceedings of the Panel of Experts about which Defendants are withholding information from Plaintiffs, and Defendants have already produced or agreed to produce all deliberative documents and communications related to the work of the Panel of Experts that were sent, received or presented to any member of the Panel during the decision-making process, including every document from a working group member that was sent or presented to the Panel or considered by the Panel.[3]

Second, Plaintiffs argue that the response does not "describe in detail" what each person actually contributed to the Panel's deliberations. That is not correct; Defendants' Civil Rule 33(d) answer to this interrogatory permits Plaintiffs, just as well as Defendants, to review the documents identified in the response and draw their own conclusions. *See* Fed. R. Civ. P. 33(d) (providing that "if the burden of deriving or ascertaining the answer will be substantially the same for either party" then the answering party may specify the records "in sufficient detail … to locate and identify them" and provide "a reasonably opportunity" to inspect records). Plaintiffs object to the form of the Rule 33(d) response, but in the sole case they rely upon the "response" of the party opposing the motion to compel in the sole case they rely upon simply

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[2] Although the names of some third party contributors to the panel have been redacted from the AR for similar reasons, the names of those contributors have been provided to Plaintiffs.

[3] Defendants recently discovered two sets of documents subject to the prior *Doe* order that they intend to produce by February 28. First, following inquiries from *Doe* plaintiffs' counsel, Defendants discovered that 126 family members of Air Force documents released in response to the *Doe* order were mistakenly still being withheld under the deliberative process privilege. Second, Defendants recently conducted a supplemental collection from a Department of Defense intranet site used by members of the Panel of Experts in relation to their work on the Panel. Defendants made this collection in the interest of ensuring completeness of the record. Defendants are planning to release 42 documents arising from this collection (although, Defendants note that a number of these documents have been previously produced in discovery pursuant to Defendants' prior collections. *See* USDOE0028908, USDOE00289508, USDOE00288103, USDOE00289261 (production no. 39)). In addition, Defendants are releasing 36 documents that on re-review Defendants have determined contain largely factual information and therefore DOD is withdrawing its prior deliberative process privilege claims. Defendants are not currently aware of any other documents responsive to the *Doe* order that are being withheld as deliberative in relation to the Panel deliberations.

stated that responsive information "will be reflected . . . in documents to be produced or already produced" by the other side. *LVB-Ogden Marketing, LLC v. Bingham*, 2019 WL 142031, at *5. Defendants' response, by contrast, provides the Bates ranges of the relevant documents and is "designed to guide the searcher to the documents responsive to the interrogatories." *O'Connor v. Boeing N. Am., Inc.*, 185 F.R.D. 272, 277–78 (C.D. Cal. 1999). It does not point to the AR or the production in a summary manner. Beyond this, it is unclear what sort of "detail" Plaintiffs demand. Defendants are under no obligation to provide Plaintiffs with a narrative summary of the records themselves under the discovery rules. Defendants' response to Interrogatory No. 18 is adequate, and Plaintiffs' motion to compel a further response should be denied.

PLAINTIFFS' REPLY[4]

A. The Government's supplemental responses to Interrogatory Nos. 16 and 17 fail to identify the principal authors of the memorandum and report.

The Government did not respond to Plaintiffs' opening argument regarding Interrogatory Nos. 16-17 substantively, and instead supplemented its responses to these interrogatories to [redacted] (Barsanti Decl. ¶ 7, Ex. 6, at 5-7, 9-12.) However, Plaintiffs' interrogatories also requested the identity of the "principal authors" of the Mattis Memorandum and DoD Report. A fulsome answer on which persons were "principal authors" is now more relevant than ever, where Defendants' new supplemental responses show that [redacted] individuals reviewed, revised or commented on each document, and it is impossible for Plaintiffs to know the level of involvement each of these [redacted] individuals had in the drafting of the documents in order to narrow their further discovery efforts.

[4] The issues addressed by the parties in this submission relate to three interrogatories. Though the parties have addressed these discovery requests together due to their common legal issues, LCR 37(a)(2)(D) allows Plaintiffs one-half page per disputed discovery request for their reply. Plaintiffs believe they are entitled to one-and-a-half pages for their reply and have limited their contribution to this submission to twelve pages in accordance with LCR 37(a)(2)(E).

B. The Government's refusal to provide additional information in response to Interrogatory No. 18 is unsupported by burden and privacy concerns.

The Government admits that it is withholding information responsive to Interrogatory No. 18, namely, the names of transgender services members and commanders who participated in a Panel of Experts meeting. The Government contends that privacy concerns justify withholding these names, but once again ignores the protective order applicable to this case. (*See* Dkt. No. 180, at 2–3.) Additionally, Plaintiffs are willing to treat the names of transgender service members who attended Panel meetings as attorneys' eyes only. The experiences and information shared with the Panel by these service members, in addition to what they may have witnessed at the Panel meetings, is relevant to understanding the Panel's process. Additionally, these same privacy concerns do not extend to the commanders who are not transgender themselves.

Further, although the Government still maintains that it may rely on Rule 33(d), it ignores that the Panel minutes and other documents pointed to in its response do not actually reveal who provided what input to the Panel. (Barsanti Decl. ¶¶ 3-4, Exs. 2-3.) In fact, the Government's responses do not even identify all minutes of meetings of the Panel, and the minutes the government cites contain only anonymized and minimal information. (*Id*. ¶¶ 3-5, Exs. 2-5.). The minutes may also paint an incomplete or biased picture of Panel meetings. (*See id.* ¶ 6; Barsanti Decl. Ex. 5 ([redacted]) Because the Government's incomplete documents do not actually answer the interrogatory, reliance on Rule 33(d) is inappropriate. *See Dibbs v. The Franklin Mint*, No. C06-604RSM, 2007 WL 4327876, at *1 (W.D. Wash. Dec. 10, 2007) (explaining that Rule 33(d) is appropriate only where "a review of documents will actually reveal answers to the interrogatories.").

Reliance on Rule 33(d) would also be misplaced even if the documents specified here were more informative. The Government makes no attempt to prove that "the burden of deriving or ascertaining the answer will be substantially the same for either party," and so does not show that it is entitled to the benefit of the Rule. Fed. R. Civ. P. 33(d). Mere burden "is not enough to justify invocation of Rule 33(d)." *LVB-Ogden Mktg., LLC v. Bingham*, No. 2:18-cv-00243-TSZ, 2019 WL 142031, at *5 (W.D. Wash. Jan. 9, 2019) (citation omitted).

CERTIFICATION

I certify that the full response by the responding party has been included in this submission, and that prior to making this submission the parties conferred to attempt to resolve this discovery dispute in accordance with LCR 37(a).

Respectfully submitted, February 28, 2020

NEWMAN DU WORS LLP

s/ Rachel Horvitz
Derek A. Newman, WSBA No. 26967
dn@newmanlaw.com
Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
Rachel Horvitz, WSBA No. 52987
rachel@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMDBA LEGAL DEFENSE AND EDUCATION FUND, INC.
Tara Borelli, WSBA No. 36759
tborelli@lambdalegal.org
Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice)
Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)
Paul D. Castillo (admitted pro hac vice)

OUTSERVE-SLDN, INC. N/K/A MODERN MILITARY ASSOCIATION OF AMERICA
Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP
James F. Hurst, P.C. (admitted pro hac vice)
Steve Patton (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice
Sam Ikard (admitted pro hac vice)

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on February 28, 2020.

s/ Rachel Horvitz
Rachel Horvitz, WSBA No. 52987
rachel@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
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Case No. 2:17-cv-01297-MJP

[PROPOSED] ORDER GRANTING LCR 37 JOINT SUBMISSION REGARDING THE GOVERNMENT'S RESPONSES TO INTERROGATORIES WITHHELD UNDER DELIBERATIVE PROCESS PRIVILEGE

NOTE ON MOTION CALENDAR:
February 28, 2020

This matter comes before the Court on the foregoing LCR 37 Joint Submission Regarding the Government's Responses to Interrogatories Withheld Under Deliberative Process Privilege (the "Joint Submission"). The Court, having considered the parties' arguments and finding good cause therefore, GRANTS Plaintiffs' portion of the Joint Submission.

IT IS HEREBY ORDERED:

1. By March 6, 2020, the Government must supplement its responses to fully answer Plaintiffs' Interrogatory Nos. 16 and 17 by specifying which persons were "principal authors" of

a. Secretary James Mattis's February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals; and

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

b. The February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons.

2. By March 13, 2020, the Government must supplement its responses to fully answer Plaintiffs' Interrogatory No. 18 by:

a. Identifying the commanders of transgender service members and transgender service members who provided input, opinions, or other information to what the government has named the "Panel of Experts"; and

b. Describing in detail what "information, statement, advice, opinion, or other input" each person provided when attending meetings of or otherwise communicating with that "Panel of Experts."

IT IS SO ORDERED

Dated this _____ day of _____, 2020.

_____
The Honorable Marsha J. Pechman
United States District Court Judge

Presented by:

NEWMAN DU WORS LLP

s/ Rachel Horvitz

Derek A. Newman, WSBA No. 26967
dn@newmanlaw.com
Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
Rachel Horvitz, WSBA No. 52987
rachel@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMDBA LEGAL DEFENSE AND EDUCATION FUND, INC.
Tara Borelli, WSBA No. 36759
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Sam Ikard (admitted pro hac vice)

Counsel for Plaintiffs